

United States Courts
Southern District of Texas
ENTERED

APR 28 2005

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Michael N. Milby, Clerk of Court

R. WAYNE JOHNSON,
(TDCJ-CID #282756)

Plaintiff,

vs.

DOUGLAS DRETKE, *et al.*,

Defendants.

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CIVIL ACTION H-05-1433

MEMORANDUM AND OPINION

R. Wayne Johnson, a Texas Department of Criminal Justice inmate, sued in April 2005, alleging civil rights violations resulting from a denial of proper nourishment. Johnson, proceeding *pro se*, sues Douglas Dretke. The threshold issue is whether Johnson's claims should be dismissed as barred by the three-strikes provision of 28 U.S.C. § 1915(g).

I. Plaintiff's Allegations

Johnson asserts that in the past four months he has lost nearly fifty pounds. He complains that prison officials are providing him with a nutritionally inadequate diet. He also claims that prison officials are adding a substance to his food to cause him to lose weight. Johnson believes that prison officials are adding a substance to his food because a similar pattern of weight loss took place at the McConnell Unit in 2002. At the time, Johnson was

filing lawsuits for fellow inmates. Following his transfer from the McConnell Unit to the Clements Unit, Johnson “gained up to 205 lbs.” (Docket Entry No. 1, Complaint, p. 3). Johnson claims that he was transferred to the E-pod and began losing weight.

Johnson is suing the Director of the TDCJ-CID because he is responsible for the prison menu. Johnson seeks injunctive and monetary relief.

II. Analysis

A prisoner is not allowed to bring a civil action *in forma pauperis* in federal court if, while incarcerated, three or more of his civil actions or appeals were dismissed as frivolous or malicious or for failure to state a claim on which relief may be granted, unless he is in imminent danger of serious physical injury. 28 U.S.C. § 1915(g).

Before filing this action, Johnson had at least three suits dismissed as frivolous. *Johnson v. Ruiz*, 4:03-1310 (S.D. Tex.)(dismissed April 24, 2003); *Johnson v. Vance*, 4:95-0068 (S.D. Tex.)(dismissed August 27, 1995); and *Johnson v. Collins*, 4:95-0064 (S.D. Tex.)(dismissed May 23, 1995). Although Johnson alleges that he is in imminent danger of serious physical injury, his weight loss over a four-month period does not constitute an “imminent danger of serious physical injury.” See *Talib v. Gilley*, 138 F.3d 211, 214 & n.3 (5th Cir. 1998). Johnson does not complain that he is deprived of meals. Johnson states that he eats all his meals and requests extra snacks. He concedes that he has requested and

received food supplements. Johnson also acknowledges that he experienced a similar weight loss in 2002.

Because Johnson's complaint does not fall within the exception to the "three-strike rule" set out in § 1915(g), he is barred under 28 U.S.C. § 1915(g) from proceeding *in forma pauperis* in this action. This case is dismissed, without prejudice.

III. Conclusion

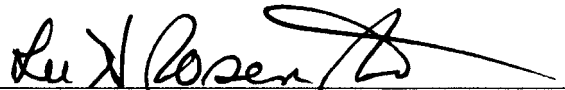
Johnson's motion to proceed as a pauper, (Docket Entry No. 2), is denied. The complaint filed by R. Wayne Johnson, (TDCJ-ID #282756), is DISMISSED under 28 U.S.C. § 1915(g).¹ All pending motions are DENIED. Johnson is warned that continued frivolous filings may result in the imposition of sanctions.

The Clerk is directed to provide a copy to the parties; the TDCJ - Office of the General Counsel, P.O. Box 13084, Austin, Texas, 78711, Fax Number (512) 936-2159; and Clerk of

¹ In *Adepegba v. Hammons*, 103 F.3d 383 (5th Cir. 1998), the Fifth Circuit barred an inmate from proceeding as a pauper under the statute, except for cases involving an imminent danger of serious physical injury, and dismissed all of the inmate's i.f.p. appeals pending in that court. The Fifth Circuit noted that the inmate could resume any claims dismissed under section 1915(g), if he decided to pursue them, under the fee provisions of 28 U.S.C. §§ 1911-14 applicable to everyone else.

Court, United States District Court for the Eastern District of Texas, 211 West Ferguson,
Tyler, Texas 75702, attention: Betty Parker.

SIGNED on April 26, 2005, at Houston, Texas.

A handwritten signature in black ink, appearing to read "Lee H. Rosenthal", written over a horizontal line.

Lee H. Rosenthal
United States District Judge